

Internal Revenue Service
memorandum

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JUL 1 1988

to: Director, Office of Field Operations

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from: Chief, Branch 3, Tax Litigation Division

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subject: Request for Opinion Regarding Extension of the Failure to File
Penalty Beyond Five Months

This is in response to your request for technical advice regarding the application of the § 6651(a)(1) and (a)(2) additions and the limitation imposed on them by § 6651(c)(1).

The inquiry you received posited a situation in which a taxpayer failed to file a return and failed to pay the tax due for an unspecified period which exceeded five months. In such a situation, the § 6651 (a)(1) and (a)(2) additions would apply concurrently, but the § 6651(a)(1) addition would be offset to the extent of the § 6651(a)(2) addition, pursuant to the provisions of § 6651(c)(1). The inquiry then suggests that, in the sixth month of the taxpayer's failure to file a return and pay his tax due, the amount of addition under § 6651 (a)(1) which had been offset by the § 6651 (a)(2) addition could be recouped. For the reasons set forth below, we believe this approach is incorrect.

As justification for the treatment suggested, the inquiry you received states that the § 6651(a)(1) and (a)(2) additions carry a statutorily imposed maximum of 25%. The effective rate of the § 6651 (a)(1) addition, when offset by the § 6651(a)(2) addition, becomes 4.5% in the first month, 9% in the second month, 13.5% in the third month, 18% in the fourth month and 22.5% in the fifth month, where a failure to file a return and a failure to pay the tax due occur simultaneously. The inquiry suggested that, therefore, in the sixth month, the § 6651(a)(1) addition has not reached its statutorily permitted maximum of 25%, and that the amount which was previously offset against the § 6651(a)(1) addition should be available to bring the addition up to the full 25%. This approach is incorrect because it seems to assume that the § 6651(a)(1) and § 6651(a)(2) additions have a combined statutory maximum of 25% when the additions are imposed simultaneously.

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Similar arguments have been made in the past by taxpayers and have been rejected by the courts. See Estate of Rauhoff v. Commissioner, T.C. Memo. 1982-494, Smith v. United States, 571 F. Supp. 664 (S.D.N.Y., 1983), DiSimone v. United States, 580 F. Supp. 221 (S.D.N.Y., 1983). As the Tax Court said in Estate of Rauhoff, supra:

Each addition to tax is imposed for a separate and distinct infraction by petitioners-the failure to timely file, in the case of section 6651(a)(1), and the failure to timely pay, in the case section 6651(a)(2). Further, each is imposed on a different amount-the amount required to be shown on the return, section 6651(a)(1), and the amount actually shown which remains unpaid, section 6651(a)(2). Finally, the period for which the respective additions are imposed are [sic] different: the addition for failure to file is for a maximum of five months, and the addition for failure to pay is imposed for a maximum of 50 months.

T.C. Memo. 1982-494, 44 TCM (CCH) 968. It is clear, therefore, that the combined maximum percentage of the § 6651(a)(1) and (a)(2) additions is not, as suggested, 25%. If a failure to file a return continues for five months or more, and a failure to pay the tax due continues for 50 months or more, the total effective rate of the additions reaches a permissible maximum of 47.5%.

The suggestion that the 3.5% of §6651(a)(1) addition lost by the offset called for by statute can be recouped cannot be supported either by the statute or the regulations. The statute specifically mandates an offset of § 6651(a)(1) by the amount of the concurrent § 6651(a)(2) addition. The statute does not label this offset a deferral. The examples set forth in the regulations clearly offset the § 6651(a)(2) amount. If this amount were recoverable in some manner at a later time, the statute or the regulations would provide a method and a justification for such a recoupment.

For policy reasons, the suggestion is also flawed. Where Congress expects the Service to recover amounts otherwise previously set off, it is to be expected that this would be made clear. When Congress has expected multiple penalties to apply in full for the same behavior, it has failed to act to prevent "stacking" of penalties, and where it specifically wishes "stacking" to be avoided, it has said so. Congress clearly designed the § 6651(a) additions to work concurrently on two different periods and two different behaviors. The approach

suggested would effectively merge the two provisions, contrary to congressional intent.

We note that your inquiry does not address a specific case or situation. Should you wish advice on a more specific factual scenario, please do not hesitate to inquire further.

Sincerely,

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Director

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